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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. _____

CITY OF TAMPA, FLORIDA,

Appellant

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

JURISDICTIONAL STATEMENT

The City of Tampa, Florida, appellant, appeals from the judgment of a three-judge United States District Court of the Middle District of Florida, Jacksonville Division, entered June 8, 1966, which reversed its former position and denied plaintiffs' prayer for an injunction and sustained the orders of the Interstate Commerce Commission authorizing the merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company. In compliance with Rules 13 and 15 of this Court, the City of Tampa submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the three-judge District Court entered June 8, 1966 is not yet reported. Copies of that opinion and of the judgment of the District Court of the same date are printed as Appendix A (pp. 2a - 50a and p. 1a, respectively) of the Jurisdictional Statement of the Florida East Coast Railway Company.[1] The previous opinion of this Court, 382 U. S. 154, is printed as Appendix B (pp. 51a - 53a). The first opinion of the three-judge District Court entered May 13, 1965, which is reported at 242 F. Supp. 14, is printed as Appendix C (pp. 54a - 70a). The report of the Interstate Commerce Commission, dated December 2, 1963, is printed at 320 I. C. C. 122; the opinion of the dissenting Commissioners is printed at 320 I.C.C. 214. Copies of the Commissioners' opinions have been provided separately for the convenience of the Court.

JURISDICTION

Florida East Coast Railway Company brought suit in the United States District Court for the Middle District of Florida to set aside an order of the Interstate Commerce Commission. A three-judge District Court was convened pursuant to Title 28, United States Code, Section 2325. The Railway Labor Executives Association, The Southern Railway Company and its affiliated companies in The Southern Railway System, and the Attorney General, representing the United States, opposed the merger and intervened or were realigned as parties-plaintiff. Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company intervened as parties-defendant.

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[1] Herein all references to appendices refer to those of the October 1966 Jurisdictional Statement of appellant Florida East Coast Railway Company.

The first judgment of the District Court, which set aside the Commission's orders, was entered May 13, 1965. Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, The Mercantile-Safe Deposit and Trust Company filed their notices of appeal to the United States Supreme Court in the District Court June 9, 1965; the Interstate Commerce Commission filed its notice of appeal in that court July 12, 1965. Thereafter, this Court vacated the three-judge District Court's judgment and remanded "for a full review of the administrative order and findings." *Seaboard Air Line R. R. v. United States,* 382 U. S. 154, 157 (1965).

Upon remand, the three-judge District Court granted the City of Tampa's petition to intervene as party-plaintiff. The second judgment of the District Court, which sustained the Commission's orders, was entered June 8, 1966, and the City of Tampa filed its notice of appeal August 8, 1966. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

The following decisions, among others, sustain the jurisdiction of this Court to review the judgment of the three-judge District Court on direct appeal: *Minneapolis & St. Louis Ry. v. United States,* 361 U. S. 173 (1959); *McLean Trucking Co. v. United States,* 321 U. S. 67 (1944).

STATUTES INVOLVED

Sections 5(2)(b), 5(2)(c), 5(2)(d) and 5(11) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(b), 5(2)(c), 5(2)(d) and 5(11); the National Transportation Policy, 49 U.S.C. note preceding Section 1; and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21; are set forth in Appendix D (pp. 71a - 73a, 73a - 74a and 74a - 82a, respectively).

QUESTIONS PRESENTED

The three-judge District Court, upon remand from this Court, has reversed its former position and sustained the orders of the Interstate Commerce Commission authorizing the merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company.

The questions presented are:

(1) whether the Commission, in determining that the merger would be consistent with the public interest despite the foreseeable injury to competition, applied proper legal standards for accommodating Section 5(2) of the Interstate Commerce Act with the antitrust legislation and rested its conclusion on adequate findings based on substantial evidence;

(2) whether the Commission utilized proper legal standards and made adequate findings estimating the scope and appraising the effects of the curtailment of competition, as required by *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), particularly with regard to the transportation monopoly which will be created by the merger in central and western Florida in the transportation of heavy, long-haul, bulk-loading commodities which account for some 77% of the business of the two merging railroads;

(3) whether the Commission could properly determine, on the present record, that the anti-competitive and monopolistic effects of this merger were outweighed by its asserted advantages so as to support a conclusion that the transaction would be consistent with the public interest;

(4) whether the Commission fulfilled its obligation to compile an adequate record concerning the anti-competitive effects of the merger, and whether the court below erred in considering that this obligation rested wholly on the parties before the Commission.

STATEMENT

On July 22, 1960, the Seaboard Air Line Railroad Company (hereafter called "Seaboard"), the Atlantic Coast Line Railroad Company (hereafter called "Coast Line"), and The Atlantic Coast Line Company filed a joint application with the Interstate Commerce Commission (hereafter called "Commission") for authority under Section 5(2) of the Interstate Commerce Act [2] to merge the properties and franchises of the Coast Line, including its motor carrier operating rights and its interest in subsidiary and affiliated railroads, into the Seaboard. On the same day, Seaboard applied to the Commission for authority to assume the liabilities and obligations of Coast Line and for authority under Section 20a of the Interstate Commerce Act [3] to issue additional common stock, which was to be issued to the shareholders of Coast Line. Pursuant to the merger plan Seaboard, the surviving corporation, is to be renamed the Seaboard Coast Line Railroad Company.

The Commission conducted hearings in several cities between November 1960 and July 1961. With two Commissioners dissenting, it issued its report dated December 2, 1963, approving the merger, subject to certain conditions.

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[2] 49 U.S.C. § 5(2).

[3] 49 U.S.C. § 20a.

The Florida East Coast Railway Company brought this action in the United States District Court for the Middle District of Florida to enjoin, annul and set aside the orders of the Commission. By its judgment dated May 13, 1965, [4] that three-judge District Court set aside those orders, without prejudice to further proceedings before or further findings and orders by the Commission.

The District Court set aside the Commission's orders because it had not made sufficient findings to disclose an accommodation of the nation's transportation policies and its antitrust policies. It recognized that Congress had entrusted to the Commission authority to approve a railroad merger prohibited by the national antitrust policy if it found the national transportation policy would be otherwise thwarted. But it said that, as a concomitant of such obligation to thus accommodate the nation's antitrust policies and its transportation policies, "the Commission must define the area of effective competition by reference to a product or service market . . . and a geographic market . . . ." [5] The District Court noted that meaningful judicial review would be otherwise impossible, saying:

> "The reason the Commission must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must be measured in terms of criteria that have been developed by Congress and the courts. If an erroneous statutory construction lies hidden in vague or insufficient findings then important statutory prerequisites to merger may be overlooked." [6]

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[4] Appendix A at 1a.

[5] *Florida East Coast Ry. v. United States*, 242 F. Supp. 14, 21 (M.D. Fla. 1965); Appendix C at 63a.

[6] 242 F. Supp. at 22; Appendix C at 65a.

Applying this holding to the instant case, the District Court concluded, "the Commission has failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section 7 of the Clayton Act." [7]

The merger applicants appealed that decision to this Court. They urged this Court to fully review the question whether, in analyzing the anti-competitive effects of a proposed railroad merger as a step in its appraisal of the public interest under Interstate Commerce Act § 5(2), the Interstate Commerce Commission was required to determine whether the merger violated the standards of Section 7 of the Clayton Act. [8] In responding to the applicants' jurisdictional statement, the Department of Justice agreed with the District Court that the Commission's findings were inadequate [9] but

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[7] 242 F. Supp. at 22; Appendix C at 65a.

[8] Jurisdictional Statement for Appellants, pp. 4-5, *Seaboard Air Line R.R. v. United States*, 382 U.S. 154 (1965).

[9] Memorandum for the United States, *Seaboard Air Line R.R. v. United States*, *supra*, at 4-5 ("[W]e do not contend that the Commission's analysis of competitive effects was adequate. The Department of Justice urged below that, tested by proper criteria, the Commission's findings in this case were *not* adequate and would renew that contention on a remand.") and at 9 ("We stress our complete agreement with the district court that the Commission is not free to make a perfunctory or superficial analysis of competition in a merger case; that it must apply standards grounded not only in its expert knowledge of railroad conditions but also in sound economic principles and the policy underlying the antitrust laws; and that exacting judicial review of the Commission's competitive findings is required. But we think the Commission can best be held to high standards in this area by careful and meticulous judicial scrutiny of the adequacy of its findings, rather than by compelling it . . . to act the precise role of a Section 7 court.").

urged that the District Court's holding set the standard for the Commission's findings too low; [10] it contended that "the practical effect of the district court's ruling could, in many cases, be to mask the actual anticompetitive effects of railroad mergers." Accordingly, the Department urged this Court to return the case to the District Court with directions "to make a fresh review of the adequacy of the Commission's findings without applying the erroneous standard of its first decision."[12]

In its *per curiam* opinion, this Court emphasized the Commission's obligation in this case to:

> " 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' " [13]

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[10] Memorandum for the United States, *supra*, at 7-8: "[T]he requirement that the Commission make a Section 7 finding misconceives the Commission's function in a rail merger case and might well aggravate the very danger that it is intended to avert—the danger of deficient appraisal by the Commission of the competitive effects of a merger subject to its approval power. . . . [T]he ultimate finding required in a Section 7 case (*i.e.*, whether the effect of the challenged merger may be substantially to lessen competition in any market) tells little about the magnitude or scope of the adverse competitive consequences of the merger, save only to say that they are sufficient to invoke the bar of the statute. Such a conclusory finding is not very helpful to an agency required to balance a lessening of competition against other public-interest factors in passing on a merger; it is not sufficiently refined for the agency's balancing task. What the agency needs to know in order to perform its statutory function properly is not whether the merger has the anticompetitive effects prescribed by Section 7 but how substantial and widespread those effects are."

[11] *Id.* at 9.

[12] Memorandum for the United States, *supra*, at 10.

[13] *Seaboard Air Line R.R. v. United States*, 382 U.S. 154, 156 (1965); Appendix B at 52a-53a.

It observed, again, that the Commission has the power "to approve the merger of railroads if it makes adequate findings in accordance with [these] . . . criteria . . . that such a merger would be 'consistent with the public interest.'" [14] Noting that the District Court had not reached "the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition" and two other issues, this Court did vacate the judgment of the District Court and remanded the case to the District Court "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court." [15]

On remand the District Court decided it had been implicitly overruled in its holding that the Commission's analysis of the merger's anti-competitive effects was inadequate. It reasoned that, because the Commission had "perceived the danger areas" in this merger and made a minimal showing to the courts that it was in the public interest, and because the Commission's action was not "arbitrary or capricious", the District Court was required to sustain the Commission's order. [16]

THE QUESTIONS ARE SUBSTANTIAL

1. A recitation of some of the salient economic facts about this merger illustrates the importance of the questions this case presents for plenary review.

The City of Tampa is the hub of central and west Florida. This area contains more than 40% of Florida's population; it is growing at a rate faster than Florida as a whole, which state in turn is growing faster than the six-state southeastern area as a whole and

[14] 382 U.S. at 157; Appendix B at 53a.
[15] 382 U.S. at 157; Appendix B at 52a-53a.
[16] Appendix A at 50a.

faster than the United States as a whole.[17] This area produces three-fourths of the nation's phosphate rock,[18] and approximately one-fifth of the world's production of that mineral.[19]

Coast Line and Seaboard are the largest railroads in Florida. Together they operate 81% of the total rail mileage in Florida.[20]

Coast Line and Seaboard are the only railroads operating throughout Tampa's market area, central and west Florida; no other railroad serves it.[21] Seaboard and Coast Line actively compete to carry commodities over their respective interlacing networks of routes through this area. Because the commodities carried are mostly heavy-loading, bulk-haul, low-value commodities, the traffic involved in these movements is predominantly rail traffic.[22] There are fifty-nine communities in the area which will have no rail competition after the proposed merger.[23] The freight volume and dollar revenue to these two railroads from traffic originating and terminating at these points far exceeds the volume and revenue derived from all similar points in the Southeast combined.[24]

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[17] Exhibit H-155, parts 1 and 2; Transcript 3509, 3509.

[18] Exhibit H-155, *supra*, at 67.

[19] Transcript 2218.

[20] 320 I.C.C. at 163.

[21] Appendix A at 21a-22a; 320 I.C.C. at 164.

[22] Appendix A at 20a.

[23] 320 I.C.C. at 164.

[24] Computed from figures in the Report and Recommended Order of Interstate Commerce Commission Examiner, *Seaboard Air Line Railroad Company-Merger-Atlantic Coast Line Railroad Company, Finance Docket No. 21215* at 70-71.

The phosphate produced in this area is the principal commodity carried and major source of revenue to both Seaboard and Coast Line. [25] It is by far the single most important commodity to the maintenance, development and growth of Tampa's port. During 1960 nearly 15 million tons of cargo moved through the Port of Tampa. [26] The applicants' exhibits show that during 1960 they independently terminated approximately 9 million tons of freight in the Tampa area with revenue in excess of $15 million and originated in excess of 2 million tons in Tampa with revenue in excess of $6 million. [27] It is precisely on this traffic that the monopoly created by the merger will have its greatest impact. Thus, the anti-competitive effects of this merger will be most severely felt in the City of Tampa's market area, central and western Florida. [28]

Coast Line operates more than 5,000 miles of track and is now the second largest railroad in the six-state area of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. Seaboard operates more than 4,000 miles of track and is now the third largest railroad in this six-state area. The merged company, which would operate in not only the six-state area but also in Tennessee and Kentucky, would operate over 16,000 miles of rail or approximately (54%) of the total rail mileage in this eight-state area. [29] The combination of these railroads would result

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[25] Exhibit H-38; Transcript 585, 1424.

[26] Transcript 2130.

[27] Exhibit H-252 (Transcript 5079, 5095), Statement A, sheets 1 and 2 shows 5,670,039 tons terminated. Exhibit H-268 (Transcript 5407), Statement BW includes water-rail movements and reports a total of more than 9 million tons. These exhibits do not list all commodities and do not include less-than-carload traffic.

[28] Appendix A at 21a-24a.

[29] 320 I.C.C. at 163.

in a company with assets of over $1 billion, annual operating revenues of some $340 million a year and combined net income of about $32 million annually. [30] Under any standard the merged company would be the largest single railroad system in the Southeast.

2. This Court should fully review this significant case because the District Court let the Commission's orders stand in spite of the Commission's failure to make adequate findings on the important antitrust issues and in spite of the Commission's failure to compile an adequate record.

The Administrative Procedue Act required the Commission to make intelligible findings defining the geographic market areas and the product market areas and appraising the scope and effect the proposed merger would have on competition in those markets. [31] As this Court once stated succinctly, the Commission is obligated to "articulate [the] . . . rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 168 (1962).

Whether the Commission's order is based on adequate findings regarding the anti-competitive effects of the proposed merger is an essential inquiry in the judicial review of this case. In *McLean Trucking Co. v. United States,* 321 U. S. 67 (1944) this Court said the

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[30] 320 I.C.C. at 146-49, 253-65.

[31] Administrative Procedure Act §8(b), 5 U.S.C. § 1007(b) provides:

> "All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Commission's order would be sustained if *"its findings are adequate* and supported by evidence," 321 U. S. at 88 (emphasis added). In *Minneapolis & St. Louis Ry. v. United States,* 361 U. S. 173 (1959) this Court sustained the Commission's order because it *"rests upon adequate findings* which are, in turn, supported by substantial evidence," 361 U. S. at 189 (emphasis added). In its *per curiam* opinion in the instant case this Court stated, again, that the Commission had the power to approve a merger *"if it makes adequate findings* in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest' "; and so it instructed the District Court on remand to fully review "the administrative order *and findings,"* 382 U. S. at 157 (emphasis added). But nowhere in its second opinion did the District Court hold that the Commission's *findings* on this aspect of the case were adequate.[33]

The City of Tampa contends the Commission was obligated to (1) intelligibly circumscribe the geographic areas and sub-areas wherein the proposed merger will affect competition for the carriage of passengers and various commodities; (2) for each geographical area and sub-area so circumscribed delineate (a) the modes of transport competing therein and (b) the passengers and various commodities important therein and (c) for

[33] The District Court said, *e.g.,* "the Commission saw . . . [that the merger would create a monopoly in parts of Florida]"; and that the Commission had "exhibited that familiarity with the complex problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experienced." Appendix A at 23a, 50a. The City of Tampa contends these statements are inadequate to constitute a holding that the Commission's *findings* are adequate and contends they express an erroneous standard for judicial review of Commission orders. See, *e.g., ICC v. J-T Transport Co.,* 368 U.S. 81 (1961).

which commodities or types of commodity each mode successfully competes; and (3) articulate its estimate of the scope and appraisal of the effects on "competition" which will result from the proposed merger. In this way, appellant contends, the Commission's order would reveal its accommodation of the nation's antitrust policies and its transportation policies and fulfill the requirements of the Administrative Procedure Act.

Until it was remanded to the District Court, there was a dispute concerning the applicability to this case of the "relevant market concepts" used in antitrust law. But upon remand the Commission conceded in its brief "that Florida and more particularly the central and western portions of that state comprise . . . a separate, relevant geographic market or sub-market." [33] By this concession, the Commission expressly acknowledged that the City of Tampa's market area is a relevant, geographic area to be considered, and implicitly acknowledged its obligation to intelligibly circumscribe all the important geographic market areas and sub-areas wherein the proposed merger will affect competition for the carriage of various commodities.

The Commission's findings obviously do not fulfill these obligations. So upon remand the Commission's argument changed from whether it was obligated to define relevant geographic markets, to whether or not the Commission had made adequate findings concerning the anti-competitive effects of the proposed merger in the one admittedly relevant geographic market and sub-market—Florida, and central and western Florida. [34]

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[33] Supplemental Brief of the Interstate Commerce Commission, p. 15, *Florida East Coast Ry. v. United States*, Civil No. 64-64-Civ J, M.D. Fla. June 8, 1966.

[34] Significantly absent from the Commission's findings is a finding that there are not other geographic markets worthy of separate consideration.

The Commission's counsel argued from carefully selected portions of the record, and not from any findings of the Commission, "what the record shows" concerning the proposed merger's effect on competition for carriage of the various commodities important in these areas. By thus basing its argument on "what the record shows" and not on its findings, the Commission has tacitly admitted it failed to make adequate findings which articulate its appraisal of the proposed merger's effect on competition in the relevant geographic areas.[35]

Further, it is apparent that the Commission failed to make findings which articulate its appraisal of the of the proposed merger's effect on competition for carriage of the bulk commodities important in even the one admittedly significant geographic market, central and western Florida.[36] For example, there is no finding as to

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[35] *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962) ("the courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ."); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[The Commission's] action must be measured by what the Commission did, not by what it might have done . . . . [Its] action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order . . . . [T]here must be such a responsible finding.")

[36] Nine commodities constitute approximately 75% of Coast Line's and Seaboard's carload tonnage and approximately 45% of their carload freight revenues. During 1959 these commodities ranked in this order:

Coast Line	Seaboard
Phosphate rock	Phosphate rock
Stone and rock, etc.	Stone and rock, etc.
Pulpwood	Pulpwood
Gravel and sand	Bituminous coal
Bituminous coal	Gravel and sand
Fertilizers, N.O.S.	Fertilizers, N.O.S.
Cement: natural and portland	Cement: natural and portland
Products of agriculture, N.O.S.	Paperboard, etc.
Paperboard, etc.	Clay and bentonite

Report and Recommended Order of Interstate Commerce Commission Examiner, *Seaboard Air Line Railroad Company-Merger-Atlantic Coast Line Railroad Company, Finance Docket No. 21215*, p. 7.

the amount of competition (in tonnage or revenue terms) for each or all of the nine principal commodities carried by Coast Line and Seaboard; no finding as to the relationship between such competition and the applicants' total traffic; no finding as to how much of the traffic for each or all of these commodities is generated in central and western Florida (or in any other significant geographic market); no finding as to the nature and effectiveness of the existing competition between the applicants for carriage of each or all of the commodities; and no finding as to the susceptibility of each or all of the nine principal commodities to intermodal competition. In fact, of these nine principal commodities, which account for approximately three-fourths of their combined tonnage, the Commission discussed only phosphate rock, and as to that commodity it made two contradictory findings. [37]

The Commission did not fulfill its obligation to make adequate findings partly because the administrative hearing record it compiled does not even contain the data from which it could validly deduce all the relevant geographic and product markets and sub-markets, much less evaluate the proposed merger's effect on competition within those markets. In its second opinion the District Court mentioned often that the record in this case is an insufficient predicate upon which to estimate the scope and appraise the effects of the curtailment of competition which would result from the proposed merger.[38] But the District Court did not consider whe-

[37] *Compare* 320 I.C.C. at 151 (phosphate rock is "essentially a commodity normally handled by rail") *with* 320 I.C.C. at 153 ("The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock.")

[38] *E.g.*, Appendix A at 19a-20a, 20a-21a, footnote 30, 38a-39a, footnote 36.

ther the case should be remanded to the Commission with instructions to develop an adequate record. Instead it erroneously put the blame for the incomplete factual record on those opposing the merger.[39]

The burden of presenting evidence concerning the proposed merger's effect on competition rested with the applicants.[40] But the Commission itself, as the statutory representative of the public interest, is obliged to develop an adequate record. It was error for the District Court, which found repeatedly that the Commission had not discharged its public responsibility, not to remand the case to the Commission for that purpose. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883 (S.D. N.Y. 1951).

3. The effective administration of judicial business suggests that plenary review by this Court of the questions presented by this case would be timely.

In its second opinion the District Court noted the two most recent decisions of this Court concerning the Commission's reconciliation of the nation's transportation policies with the competition favored by the nation's antitrust policies, *viz.*, *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) and *Minneapolis & St. Louis Ry v. United States*, 361 U. S. 173 (1959). In order to dispose of the antitrust issues presented in

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[39] Appendix A at 38a: "The greatest problem that we have experienced is that none of the plaintiffs in this case chose to build a record before the Commission on which to support their contentions. . . . [H]ad the government availed itself of the opportunity to build a record showing the basic facts it claims could be shown, this record might be made to tell a different story."

[40] Administrative Procedure Act § 7(c), 5 U.S.C. § 1006(c).

McLean, a trucking industry case where substantial intramodal competition would exist after the proposed merger, this Court needed to decide only that the antitrust laws had to be accommodated by the Commission with the transportation laws. In order to dispose of the antitrust issues presented in *Minneapolis*, a railroad industry case in which several competing railroads each sought to acquire control of the Toledo, Peoria & Western Railroad, this Court affirmed the Commission's choice of that merger of railroads which maintained the greatest amount of intramodal competition. The instant case now presents this question: how must the Commission accommodate the antitrust laws with the transportation laws where the choice is either merger at the expense of competition or no merger to preserve competition.

Finally, as the United States' Memorandum in the prior appeal phrased it, the present case involves "a proposed merger of great magnitude and far-reaching implications for the future structure of the railroad industry . . . ."[41] It is the first of the current railroad merger proposals to reach this Court. Other rail unification proposals are pending in various stages before the courts and Commission. The antitrust questions inhering in these other pending railroad mergers emphasize the need for this Court to consider and to decide the standards to be applied when appraising the anticompetitive effects of these proposed mergers.

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[41] Memorandum for the United States, pp. 6-7, *Seaboard Air Line R.R. v. United States*, 382 U.S. 154 (1965).

CONCLUSION

This appeal presents a question of substantial importance and probable jurisdiction should be noted.

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October 1966